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Oswald Zachrisson, et al.,

Appellants,

v.

William J. Miller, Administrator, et al.,

On Appeal From the Supreme Court of the State of Oregon.

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

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[redacted]

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

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No. 21

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Petitioners herein are attorneys at law duly admitted to practice in all of the state and federal courts in the State of California and are all admitted to practice before the Bar of the Supreme Court of the United States.

Petitioners have handled numerous cases in the state courts of the State of California involving the application and interpretation of the provisions of Probate Code §259 and the subsequent sections of the Probate Code of the State of California.

Probate Code §259 provides:

"The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposi-

tion, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this state by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. (Added Stats. 1941, c. 895, p. 2473, § 1, effective July 1, 1941, as amended Stats. 1945, c. 1160, p. 2208, § 1; Stats. 1947, c. 1042, p. 2443, § 1.)"

This section is commonly known as the Reciprocity Section of the California Probate Code and governs the rights of aliens to participate in the distribution of probate estates in the State of California.

The petitioners herein have been attorneys of record in two cases involving the interpretation and application of Section 259 of the Probate Code before the Supreme Court of the State of California; one of these cases involved heirs residing in the Union of Soviet Socialist Republics; the other case involved heirs residing in the People's Republic of Rumania.

In each of these cases your petitioners asserted on behalf of their clients the position that if a court was to hold on the facts of the case that reciprocal rights of inheritance did not exist between the United States and the country in which the heirs resided, then such ruling would be in violation of the United States Constitution and particularly Article I, Section 10, in that the statute constituted an unlawful invasion by the State of California of the exlcusive power of the federal government to govern the foreign affairs of the United States.

The constitutional issue was raised at each level of the proceedings within the State of California but ultimately in *Estate of Larkin,* 65 A.C. 49, 52 Cal. Rptr. 441, 416 P. 2d 473, and *Estate of Chichernea,* 66 A.C. 74, 57 Cal. Rptr. 135, 424 P. 2d 687, the Supreme Court of the State of California determined that reciprocal rights of inheritance did exist between the United States and each of the countries involved. The court, herefore, never reached the ultimate constitutional question although the court raised serious questions as to the constitutionality of Probate Code 259 in the following language:

> "Moreover, a construction of section 259 which would charge our courts with the duty of assessing the 'democracy quotient' of foreign states and the degree to which they pursue foreign policies consistent with our own would imperil the constitutionality of the statute. In Clark v. Allen (1946) 331 U.S. 503, 67 S.Ct. 1431, 91 L. Ed. 1633, the United States Supreme Court upheld the constitutionality of section 259 against a challenge that it represented a prohibited state venture

into the field of foreign affairs. The court rejected as 'farfetched' the contention of the challengers that the California Legislature had undertaken to stimulate foreign states to extend reciprocal inheritance rights to our citizens, a matter clearly within the exclusive competence of the federal government. The court considered that any effect which the statute migh have on foreign countries was merely 'incidental.'

The commentators have seriously criticized the reasoning of the *Clark* decision. One writer declares that the court 'grossly underestimate[d] the effect of the California statute on foreign relations' and that the decision is inconsistent with prior and subsequent court rulings. (Boy, The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents' Estates (1963) 51 Geo.L.J. 470, 493-500; cf. Hawley, Succession, 1964 Annual Survey of American Law 585, 591.)

Similarly, Justice Douglas, himself the author of *Clark*, has declared that he believes the time has come to reconsider the rationale of that decision in light of the 'notorious' practice of certain state courts 'in withholding remittances to legatees residing in Communist countries' and thus affecting the foreign relations of this country in a manner not justified by any legitimate state interest in regulating the local aspects of inheritance. (Ioannou v. New York (1962) 371 U.S. 30, 83 S.Ct. 6, 9 L.Ed.2d 5, per curiam dismissal of appeal, Justices Douglas and Black voting to note jurisdiction, opinion by Justice Douglas.) Whatever the present status of the *Clark* decision, the construc-

tion of section 259 for which the Attorney General contends in the present case goes well beyond that deemed 'farfetched' in *Clark*."

Estate of Larkin, 65 A.C. 49, 52 Cal. Rptr. 441, 416 P. 2d 473.

The petitioners have pending in the state courts of California several cases involving heirs residing in foreign countries in which a challenge to the claim of the heirs has been made by the Attorney General of California or by private counsel on the ground of failure to comply with Probate Code 259. In each of such cases there looms constantly in the background the overriding question of the constitutionality of the California Probate Code Section.

Since the record before this court raises an issue as to the constitutionality of the Oregon statute and the determination of this issue by this court will seriously effect the interpretation of the California Reciprocity statute, Probate Code §259, your petitioners believe it of importance that the direct relevance of the court's ruling on the Oregon statute to Probate Code §259 in the State of California must be brought to the attention of this Honorable Court. Only by means of the attached Amicus Curiae Brief can the issues be properly brought before the court.

Your petitioners have sought the consent of the parties in the case before this court for the filing of the attached brief; we have received the written consent of Peter Schwabe, Esq., attorney for the appellant, but Wayne M. Thompson, Assistant Attorney General, representing Robert Y. Thornton, Attorney General of the State of Oregon, informed us that his office

was withholding its consent and requested that we obtain leave of the court to file our brief.

Because the time element is so short, we are attaching herewith our proposed brief together with this Motion for Leave to File the brief and respectfully request that leave of court be so granted and that the attached brief be filed in the case.

Dated: August 23, 1967.

Respectfully submitted,

SLAFF, MOSK & RUDMAN,
By EDWARD MOSK,
Amicus Curiae.

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AMICUS CURIAE BRIEF.

I.
Interest of Amicus Curiae.

The interest of the *Amicus Curiae* in the subject matter of this case has been set forth in the Petition for Leave to file this *Amicus Curiae* Brief filed concurrently herewith and the statements set forth therein are incorporated herein by reference.

II.
Argument.

Probate Code §259 has as its sole Declared Legislative purpose the molding of the foreign policy of the United States.

The original California statute was enacted in 1941 as an emergency measure and the following statement of urgency accompained its passage:

> "A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign *governments guilty of these practices constitute a direct threat to the government of the United States,* it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the government of the United States (Cal. Stat. 1941 see 895, §2, page 2474)." [Emphasis added.]

That the primary purpose of the statute is to govern and effect the foreign policy of the United States (and the foreign policy of other countries) is further clarified in the "Recommendation and Study Relating to the Right of Non-Resident Aliens to Inherit" prepared by the California Law Revision Commission in January 1959. This report was prepared in connection with suggested revisions of the California law. The report sets forth three policy reasons for the enactment of

this type of legislation. Suggested as the second and third reasons are:

> "2. To prevent assets in the United States from falling into the hands of unfriendly nations.
>
> "3. To *bring about policies in foreign nations* which would permit United States citizens to inherit property in those nations." [Emphasis added]

The California Law Revision Commission pointed out in connection with the third reason that "this is an interest which the federal government often seeks to advance by means of reciprocal treaty provisions establishing the inheritance rights of the citizens of one nation in estates in the other nation". (See California Law Revision Commission: Recommendation and Study Relating to the Rights of Non-Resident Aliens to Inherit, January 1959, B-19.)

It is difficult to conceive of a more strongly worded statement of the policy of the State of California showing the intent to effect the foreign relations of the United States.

The Commission in making its recommendation stated further at page B-5:

> "Moreover, keeping American assets out of the hands of enemies or potential enemies is a function more appropriately performed by the United States Government. This responsibility is in fact being handled adequately by the Federal Government through such regulations as the Trading With the Enemy Act and the Foreign Assets Control Regulation of the Secretary of the Treasury."

Amicus Curiae herein is well aware of the decision in *Clark v. Allen,* 331 U.S. 503 (1946), but asserts

that to the extent that the issue presented herein was adequately before the court at the time of that decision, then *Clark v. Allen* is erroneous. It is submitted that the development of world trade, the increasing sensitivity of all actions taken by any governmental bodies in the world arena, the developments in communication and transportation, and even the proliferation of new nations since 1946 require a reexamination of the legal and factual foundations of *Clark v. Allen.*

There can be no question that the exclusive right to make treaties relating to the reciprocal rights of inheritance resides solely in the legislative and executive branches of the federal government. Certainly no state could enact legislation which contravenes the treaty making power of the federal government. (*Kolovrat v. Oregon,* 366 U.S. 187 (1961).) The failure of the federal authority to enter into a treaty defining the inheritance rights of American citizens in a particular country and the citizens of that country in the United States may itself be a federal policy determination not to be interfered with by the states.[1] For the State of California to attempt to pressure a foreign government (as the State of California admittedly seeks to do in the enactment of Section 259) is then clearly an act by the State of California to go over the head of the federal authorities and by its own legislation influence foreign governments in their attitudes and legislation relating to the citizens of California.

The seriousness of the issue is sharpened by the differences between the laws of the State of California and

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[1]See Boyd, The Invalidity of State Statutes Governing the Share of Non-resident Aliens in Decedents' Estates, 51 Georgetown L.R. 470, 511.

the State of Oregon. Thus a foreign country in order to be reciprocal with California need only treat California citizens in the same manner as they treat citizens of their own country in matters of inheritance; but to be reciprocal with Oregon the foreign country must go further and enact satisfactory legislation to the State of Oregon relating to the transfer of funds out of the country and must also meet the "use and benefit" requirements of Oregon.

Thus despite the fact that the Federal Constitution places the entire responsibility for determining foreign policy and treating with foreign countries in the hands of the federal government, in order to protect the inheritance rights of its citizens in the various states in the United States a foreign country must examine carefully and respond to the directives of each and every one of the fifty states of the United States in the field of inheritance. Placing this burden upon foreign countries immediately affects adversely the foreign relations power of the federal government, in that it can no longer be said that that power and right rests exclusively in the federal government.

Many nations have their own reciprocity provisions in matters of inheritance,[2] currency regulations, and other fields. If each of the fifty states of the United States can enact legislation requiring a particular type of action by the foreign country, how can the foreign country apply its own principles of reciprocity with regard to the United States? Must the citizens of California lose their right of inheritance in Hungary because Hungary determines that the United States is not

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[2]See for example Hungary (Law in Eastern Europe, ed. Z. Szirmai, #5, The Law of Inheritance in Eastern Europe, p. 180.

practicing reciprocity so long as Oregon retains on its books a more restrictive alien inheritance law? Yet such a result is quite possible if each state is permitted to establish its own "foreign policy" in matters of inheritance.

Amicus Curiae represents many aliens in the California courts and have matters pending foreign courts on behalf of citizens of California. A determination that the Oregon statute is constitutional could adversely affect the rights of California citizens abroad by reason of the restrictions on the rights of aliens in Oregon; and counter actions against American citizens because of Oregon law in some foreign country in matters of inheritance could ultimately cause California courts to declare that nation non-reciprocal with California. The mere stating of this proposition makes clear that the Oregon statute (and all state reciprocity statutes including Probate Code §259 of California) unconstitutionally impinge on the exclusive foreign relations power of the Federal Government.

III.

Conclusion.

The world of 1946 when *Clark v. Allen* appeared to approve individual state reciprocity statutes no longer exists. Since that time we have had a proliferation of nations, an increase in trade and commerce, a development of interchange of populations and a recognition of the fact that all actions taken by countries in any field of the law which effect the citizens of the other country can have serious and long range effects on the foreign policy of the United States. More than one war (hot or cold) has resulted from the actions of individual countries vis-a-vis the citizens of another country.

Large transfers of populations have occurred and refugees have moved from one country to another with not an insubstantial number of such refugees ending up in the United States.

In this shrinking world to give the power to affect foreign relations to each of the fifty states can prove disastrous to the foreign relations prerogative of the federal government and fortunately also runs counter to the exclusive power granted to the federal government by the United States Constitution. (Article I, §10.)

For this reason *Amicus Curiae* urges this court to find in accordance with the position asserted by the appellant from Oregon that the Oregon statute is unconstitutional in that it impinges on the exclusive foreign relations power of the federal government.

Respectfully submitted,

SLAFF, MOSK & RUDMAN,
By EDWARD MOSK,
Amicus Curiae.